not reported

127-984

(6)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 307. 37

JAMES M. KENNEDY, ROBERT BAXTER, AND HUGO VOGLE, AS COUNTY COMMISSIONERS OF THE COUNTY OF NANCE, APPELLANTS,

vs.

BARTLEY LAMB, FRANK HODGES, J. H. UMSTEAD, NELSON W. MAIN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 20, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 307.

JAMES M. KENNEDY, ROBERT BAXTER, AND HUGO VOGLE, AS COUNTY COMMISSIONERS OF THE COUNTY OF NANCE, APPELLANTS,

vs.

BARTLEY LAMB, FRANK HODGES, J. H. UMSTEAD, NELSON W. MAIN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	1	1
Petition for injunction	1	1
Answer	9	5
Petition for removal	12	7
Bond for removal	13	8
Replication	15	9
Stipulation as to facts	15	9
Decree	18	11
Clerk's certificate	20	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 23, 1887.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of May, A. D. 1884.

Be it remembered that on the 7th day of January, 1884, a transcript was filed in the office of the clerk of said circuit court; the petition, answer, and petition and bond for removal of which said transcript are in words and figures following, to wit:

Petition for Injunction.

STATE OF NEBRASKA, } *ss:*
County of Nance, }

In the District Court in and for Nance County.

BARTLEY LAMB *et al.*
vs.
JAMES M. KENNEDY, ROBERT BAXTER, and HUGO VOGEL, as County Commissioners of said County.

Your petitioners, Bartley Lamb, Frank Hodges, J. H. Umstead, Nelson W. Main, A. F. Treadway, Silas Main, W. J. Johnston, M. H. Huff, J. W. Zink, Michial Ryan, and W. F. Hinman, residents, citizens, and tax-payers in and for the precinct of Fullerton, in the county of Nance aforesaid, who sue in their own behalf and in behalf of all the tax-payers of said precinct who claim the benefit of this petition and are willing to contribute toward the expense of maintaining the same, respectfully represent that heretofore,

2 to wit, on the 16th day of August, A. D. 1883, a certain order was made by the said James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of said county, to the effect following: That there be submitted to the legal voters of said precinct at a special election to be held at a place of voting in said precinct hereinafter designated, on the 17th day of September, A. D. 1883, for the purpose of voting on the following proposition, to wit:

Shall the county commissioners of the county of Nance and State of Nebraska issue and give to the Omaha, Niobrara and Black Hills Railroad Company, a corporation organized and existing under the laws of the State of Nebraska, the coupon bonds of and for said precinct, in said county and State, to the amount of $17,000, to aid in the construction of a railroad from Genoa to Fullerton, in Nance county, in said State, or to a point in the south half of section 11, town. 16, range 6 west, of the 6th principal meridian, said bonds to be issued in sums of 1,000 dollars each, to be made payable to the bearer, to be dated on the first day of January, A. D. 1884, and become due twenty years from the date thereof, with annual interest at the rate of seven per cent. per annum, payable annually on the first day of January of each year, upon interest coupons thereto attached, both interest and principal to be payable at the fiscal agency of the State of Nebraska in the city of New York.

And shall the county commissioners of said court of Nance cause

to be levied on the taxable property of the said precinct in said county a tax annually sufficient for the payment of the interest on said bonds as it becomes due; and after the expiration of ten years from the date of said bonds shall said county commissioners of said Nance county cause to be levied, in addition to all taxes on
3 the taxable property of said precinct, an amount of taxes sufficient to create a sinking fund for the payment at maturity of the principal of said bonds, and shall the tax be continued from year to year until said bonds are fully paid, provided that said precinct shall only be liable to pay interest on said bonds from the time that said railroad company shall become entitled to receive the same, as hereinafter provided; and provided further that the said bonds shall be issued to said railroad company when said road shall be graded, tied, and ironed and completed ready for the running of trains and trains running thereon from said Genoa to Fullerton, provided the same shall be completed to said Fullerton or to the said point in the south half of section 11, town. 16, range 6 west, of the 6th principal meridian, on or before the first day of January, A. D. 1884.

Said railroad when completed shall be of uniform gauge with the Union Pacific railroad, and shall be maintained and operated as a first-class railroad.

All of said bonds shall be executed and issued to said company within five days from the completion of said road in case this proposition shall be adopted, and enough coupons shall be detached and canceled on said bonds at the date of their delivery to make the same draw interest only from the date when said company becomes entitled to the delivery of said bonds.

And if two-thirds of the votes cast at such election shall be in favor of the proposition hereby submitted, then said county commissioners of Nance county shall be authorized to execute and issue the said coupons as herein provided, and shall execute and issue the same accordingly.

4 The form in which the above proposition shall be submitted shall be by ballot, upon which ballot shall be printed or written, or partly printed and partly written, the words following, viz: "For railroad bonds and tax, yes;" or "For railroad bonds and tax, no;" and if two-thirds of the votes cast shall have thereon the words "For railroad bonds and tax, yes," then this proposition shall be declared adopted; and if more than one-third of the votes cast shall have upon them the words "For railroad bonds and tax, no," then said proposition shall be declared lost.

Said election to be held at the court-house at Fullerton, in said precinct.

The polls of said election shall be opened at 8 o'clock in the forenoon, and shall continue open until 6 o'clock in the afternoon of said day, and said election shall be conducted according to law.

By order of the board of county commissioners of Nance county, this 16th day of August, A. D. 1883.

E. D. GOULD, *County Clerk*,
By J. W. McCLELLAND, *Deputy*

Your petitioners further represent that the clerk of the board of county commissioners, on the 16th day of August, A. D. 1883, caused a notice of said special election, so ordered to be held on the 17th day of September, A. D. 1883, to be published in the Nance County Journal, a weekly newspaper published in said county, for four consecutive weeks, the first insertion of said notice being on the 16th day of August, A. D. 1883; and that, in pursuance of said notice, a pretended election was held at the court-house in Fullerton on the 17th day of September aforesaid, and said pretended election resulted as follows: For railroad bonds and tax, 235; against railroad bonds and tax, 67; and that, in pursuance of said pretended
5 election and vote, said county commissioners are threatening and intending to issue said bonds and coupons, amounting in the aggregate to the said sum of $17,000 of bonds, with annual coupons for interest running through a period of twenty years.

Your petitioners further represent that at the time of the ordering of said election in said precinct there was not of taxable property in said precinct subject and liable to assessment and taxation one hundred and seventy thousand dollars; that said taxable property in said precinct was assessed in the year 1882 at, to wit, the sum of $72,582.00; that the valuation of the property of said precinct for the year 1882 should be taken as the basis, limiting the authority of said board of commissioners, if they possessed any authority whatever to submit the question to a vote of the legal voters of said precinct, to an amount not exceeding $7,260.00.

Your petitioners further represent that the property in said precinct was assessed in the year A. D. 1883 at, to wit, the sum of $176,000.00; that they are advised by counsel and believe that the assessment for the said year A. D. 1883 is, in part at least, illegal, the assessment being on a large amount of lands in said precinct the title to which is still in the Government of the United States, and of which said lands so assessed for taxation the pretended taxpayer not being entitled to a conveyance from the Government of the United States. Said lands so wrongfully assessed as aforesaid are assessed at, to wit, $20,000.00, and because thereof and of the premises aforesaid said order of the commissioners and all the subsequent proceedings had in pursuance thereof are null and void, and confer no authority upon said commissioners to issue said bonds and coupons.

6 Your petitioners further represent that they are advised by counsel and believe that the board of county commissioners under the statute and laws of said State possess no authority or jurisdiction to order said election and issue said bonds.

6. Your petitioners further represent that said pretended election was not held, conducted, and returns thereof made in the manner required by law, but, on the contrary, the canvass of said election was not publicly made and the opposition to said bonded indebtedness were prevented from witnessing said canvass of said votes, and because thereof said election was illegally held and conducted.

Your petitioners further represent that the order of said commissioners aforesaid was so drawn and submitted that the voter voting

on said proposition was required to vote on the proposition to issue bonds, etc., and to levy a tax annually for the payment of the interest on said bonds as said interest becomes due, as a unit, instead of submitting the proposition aforesaid and the annual tax aforesaid separately as two separate and distinct propositions, and that the amount of tax to be annually levied for the payment of said principal and interest, as required by the statute, is not embraced in the order of submission, and said board of commissioners are not authorized by law to levy said tax upon the taxable property in the precinct. On the contrary, the tax required to be levied must be levied, fixed, and the amount thereof determined by the vote of the legal voters of said precinct.

8. Your petitioners further represent that said order of submission — notice thereof as aforesaid did not conform to the requirements of the statutes in such case made and provided, and confers no authority upon said board of commissioners to issue said bonds and coupons.

7 9. Your petitioners further represent that they are the owners and holders of real estate of great value situate in said precinct, and that the same is and will be liable to be burthened with the payment of taxes for the purpose of paying the bonds and coupons aforesaid if said bonds and coupons are issued and negotiated and come into the hands of *bona fide* holders, and because thereof said bonds ought not to be issued.

Your petitioners further represent that they are remote from the supposed line of said railroad, and would receive little or no accommodation from said railroad, and that the issuing of said bonds and coupons and the encumbering of their property with taxes with which to pay said bonds and coupons for a period of twenty years' time that they are to run would materially lessen the value of the taxable property of your petitioners.

11. Your petitioners further represent that the encumbering of your petitioners' property as aforesaid with a bonded indebtedness is, as your petitioners are informed and believe, equivalent to the taking of the property of one person and giving it to another without just compensation, and is the exercise of arbitrary and despotic power and violates every principle of civil government and of the Constitution of the United States and of the State of Nebraska, and because thereof your petitioners are without a plain, adequate, and complete remedy except by application to this honorable court.

Your petitioners therefore pray that James M. Kennedy, Robert Baxter, and Hugo Vogle, as commissioners of said county, may be made parties defendant to this petition, and that process, etc., may be issued to bring them into court, and that they may be compelled to answer all and singular the allegations herein contained;

8 that, pending the hearing of this petition, a temporary injunction may be awarded restraining said defendants and each and every of them from issuing and delivering said bonds and coupons or each or any of them, or from doing any act whatever with reference thereto that will subject the property of your petitioners to taxation for the payment of said bonds and coupons, and that

upon the final hearing said injunction may be made perpetual, and said defendants and their successors in office may be perpetually enjoined from issuing said bonds and coupons, or in any manner executing or directing the execution of the same, or from negotiating or delivering said bonds or coupons to any person or persons whomsoever.

Your petitioners pray for such other, further, and different relief as equity and good conscience may require.

HENRY & CRITCHFIELD,
For Petitioners.

STATE OF NEBRASKA, } ss:
County of Nance, }

A. F. Tredway makes oath and says that he has heard read the foregoing petition and knows the contents thereof, and that the facts therein stated on his own knowledge are true, and that the facts stated on information and belief he believes to be true.

A. F. TREDWAY.

Subscribed in my presence and sworn to before me by the said A. F. Tredway this 6th day of November, A. D. 1883.

[SEAL.] THEO. F. ELLIOTT,
County Judge.

Filed Nov. 7, 1883.

E. D. GOULD,
Clerk Dist. Court.

9 *Answer.*

In the District Court in and for Nance County, Nebraska.

BARTLEY LAMB *et al.*
vs.
JAMES M. KENNEDY, ROBERT BAXTER, and HUGO VOGLE, County Commissioners of Nance County, Nebr.

Now come the said defendants, and, for answer to the petition of the said plaintiffs filed herein, say—

That in their official capacity as the board of county commissioners of Nance county, Nebraska, they did make the order of the 16th day of August, 1883, submitting a proposition to the voters of said Fullerton precinct, as alleged in said petition, and say that they had the right to make such order; that the election, pursuant to such order, was held; that all the requirements of law in respect thereto were complied with; that said election resulted, as alleged in said petition, in favor of said bonds.

Defendants deny that at the time of ordering said election there was not taxable property in said precinct subject and liable to assessment and taxation to the value of one hundred and seventy thousand dollars, and deny that the value of the property of the said precinct for the year 1882 should be taken as the basis in limiting the authority of said board of commissioners to submit said proposition to a vote of the voters of said precinct.

Defendants say that at the time of submitting said proposition and ordering said election the value of the taxable property in said

precinct was sufficient to warrant said order and was far in
10 excess of the amount alleged in said petition, and that it equaled the sum of $170,000 and more, as shown by the returns of the assessor of said precinct.

Defendants deny that a large amount of lands in said precinct were illegally or wrongfully assessed, the title to the same being still in the Government of the United States; but defendants say that the assessment for the year 1883, as alleged in said petition, is valid and legal, and shows the correct valuation of the lands in said precinct subject to taxation.

Defendants deny that any of the lands in said precinct have been wrongfully assessed, but that the same are and were, for the year 1883, subject to taxation, and defendants deny that the Government of the United States has any such title to said lands as will exempt the same from taxation in said precinct.

Defendants deny that they had no authority or jurisdiction to order said election and deny that they possess no authority or jurisdiction to issue said bonds; but defendants say that their authority and jurisdiction in the premises are ample and complete.

Defendants deny that said election was not held and conducted and the returns thereof made in the manner required by law, but say that the law in respect thereto was strictly complied with. Defendants deny that the said proposition submitted to the voters as aforesaid was improperly or illegally submitted, and that it was in any way calculated to mislead the said voters; but defendants say that said proposition was properly and legally drawn and submitted, and defendants say that they were not bound, and were under no legal obligations, to divide the said proposition and submit the same as two separate and distinct propositions, as alleged in said
11 petition. Defendants deny that the amount of tax to be annually levied for the payment of the principal and interest of said bonds was not embraced in said order, but say that the same was distinctly provided for in said proposition.

Defendants deny that said plaintiffs' lands will be burdened with taxes for the purpose of paying said bonds in case the same are issued and negotiated, and deny that the said lands and property will be depreciated in value on account thereof. On the other hand, defendants say that the property of said plaintiffs will be enhanced in value by reason of the construction and completion of said railroad.

Defendants deny that said plaintiffs' property has been taken without just compensation, and deny that said plaintiffs are without adequate remedy at law; and defendants deny each and every other allegation in said petition contained not herein expressly admitted, and the defendants say that said petition does not exhibit sufficient equities to entitle plaintiffs to the relief asked.

Wherefore defendants pray that the order of injunction issued herein may be vacated, and that they be dismissed hence with costs.

J. M. THURSTON,
GEO. D. MERKLEJOHN,
M. S. LINDSAY, *For Def'ts.*

STATE OF NEBRASKA, } ss:
County of Nance, }

James M. Kennedy, being duly sworn, deposes and says he is chairman of the board of county commissioners of the county of Nance, which is a public corporation organized and existing under the laws of Nebraska; that he knows the contents of the foregoing answer, and that the facts therein stated are true.

JAMES M. KENNEDY.

12 Signed in my presence and sworn to before me this 10th day of December, 1883.

——— ———.

Filed Dec. 12, 1883.

E. D. GOULD, *Clerk,*
By J. W. McCLELLAND, *Deputy.*

Petition for Removal.

STATE OF NEBRASKA, } ss:
County of Nance, }

In the District Court in and for said County.

To the honorable the judge of said court, in chancery sitting:

Your petitioners, Bartley Lamb, Frank Hodges, J. H. Umstead, Nelson W. Main, A. F. Tredway, Silas Main, W. J. Johnston, M. H. Huff, J. W. Zink, Michiel Ryan, and W. F. Hinman, respectfully represent that heretofore, to wit, on the 7th day of November, A. D. 1883, there was filed in said court a petition against James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of the county of Nance; which said petition is referred to and asked to be taken and made a part of this application for the removal of said cause from the State court of the State of Nebraska aforesaid into the circuit court of the United States within and for the district of Nebraska.

Your petitioners further represent that said cause is now depending and undetermined in the State court aforesaid, and is removable under the act of March 3rd, A. D. 1875.

Your petitioners further represent that there is involved in said cause a question of law arising under the Constitution and laws of the United States and under the act of Congress admitting the State of Nebraska into the Union; which said question is material to a just and correct decision of said cause.

13 Your petitioners further represent that the amount in controversy in said cause exceeds the sum of five hundred dollars over and above all costs, to wit, the sum of $17,000.00, and that your petitioners present herewith, in compliance with the act of March 3rd, A. D. 1875, a bond, with good and sufficient security, conditioned as required by said act, for the removal of said cause from the State court aforesaid into the circuit court of the United States in and for the proper district, and ask that said district court proceed no further, and that said cause be duly certified into the circuit court of the United States aforesaid, in compliance with the act of Congress aforesaid. HENRY & CRITCHFIELD,

For Complainants.

STATE OF NEBRASKA, } ss:
County of Nance, }

W. F. Critchfield makes oath and says that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true as he verily believes.

W. F. CRITCHFIELD.

Subscribed and sworn to before me by the said W. F. Critchfield this 12th day of December, A. D. 1883.

[SEAL.] THEO. F. ELLIOTT,
County Judge.

Endorsed: Filed Dec. 12, 1883. E. D. Gould, clerk, by J. W. McClelland, deputy.

Know all men by these presents that we, Bartley Lamb, Frank Hodges, J. H. Umstead, Nelson W. Main, A. F. Tredway, Silas Main, W. J. Johnston, M. H. Huff, J. W. Zink, Michiel Ryan, and W. F. Hinman, as principals, and Brafford Johnston, as security, are held and firmly bound unto James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of the county of Nance,
14 in the State of Nebraska, in the penal sum of two hundred dollars, the payment of which is well and truly to be made, upon the following conditions: That whereas a petitition has been filed by the obligors above named against the said Kennedy, Baxter, and Vogle, as county commissioners of the county of Nance, in the district court of the State of Nebraska in and for said county of Nance, asking that a certain suit now depending in said district court may be removed into the circuit court of the United States for the proper district of Nebraska:

Now, if the said complainants in said petition shall file in the circuit court of the United States in and for the district of Nebraska, on the first day of the next term of said United States circuit court, certified copies of the process issued in said cause, and also the pleadings and depositions in said cause, and shall pay all costs in case said circuit court of the United States adjudges that it has no jurisdiction and that said removal of said cause was improperly made from the State court to the circuit court of the United States aforesaid that shall be adjudged against them by reason of said removal, then this obligation shall be void; otherwise to be and remain in full force.

BARTLEY LAMB,
J. H. UMSTEAD,
A. F. TREDWAY,
W. J. JOHNSTON,
MICHIEL RYAN,
FRANK HODGES,
NELSON W. MAIN,
SILAS MAIN,
M. H. HUFF,
J. W. ZINK,
W. F. HINMAN,
By W. F. CRITCHFIELD, *Att'y.*
BRAFFOR JOHNSTON.

The foregoing bond and the surety thereon are hereby approved by me this 12th day of December, 1883.

E. D. GOULD, *Clerk*.
By J. W. McCLELLAND, *Deputy*.

15 Endorsed: Filed Dec. 12, 1883. E. D. Gould, by J. W. McClelland, dep.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 202, H. Bartley Lamb *et al. vs.* James M. Kenedy *et al.* Transcript. Filed Jan. 7, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 22nd day of May, 1884, a replication was filed in said case; which said replication is in words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, *District of Nebraska:*

In the Circuit Court. May Term, A. D. 1884.

Replication of Bartley Lamb *et al.*, complainants in the case of Bartley Lamb *et al. vs.* James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of Nance county, Nebraska, now depending in said court.

Complainants, for replication to defendants' answer, say that said bill is certain and sufficient to be answered, and that said answer is uncertain, insufficient, and untrue; without which said answer is true.

HENRY & CRITCHFIELD,
Solicitors for Complainants.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 202, H. Bartley Lamb *et al. vs.* James M. Kennedy *et al.* Replication. Filed May 22, 1884. Elmer D. Frank, clerk, by E. S. Dundy, Jr., deputy.

Thereupon, afterwards, to wit, on the 22nd day of May, 1884, — stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the District of Nebraska.

BARTLEY LAMB *et al. vs.* JAMES M. KENNEDY *et al.*

It is hereby stipulated and agreed, for the purpose of the
16 hearing of this case, that the complainants are citizens of Fullerton precinct, in Nance county, Nebraska, and the defendants are the commissioners of said county, and that as such commissioners, on the 16th day of August, 1883, they made a certain

order submitting a proposition for an election to be held in said precinct, which said order is correctly copied in said complainants' bill, and that said order and proposition was duly published, as required by law, in the Nance County Journal, a weekly newspaper published in said county, for four consecutive weeks, the first insertion of said notice being on the 16th day of August, 1883, and that in pursuance of said notice an election was held at the court-house in Fullerton on the 17th day of September aforesaid, and resulted as follows: For railroad bonds and tax, 235 votes; against railroad bonds and tax, 67; that said vote was duly canvassed, and said proposition declared adopted by said board of county commissioners, and the result thereof duly declared and published, and that said commissioners having complied with the statute in every particular, save as may appear on the face of said proposition.

And that in pursuance of said election the county commissioners of said county are threatening and intending to issue said bonds and coupons, amounting in the aggregate to the sum of $17,000 of bonds, with annual coupons for interest running through a period of twenty years.

It is further agreed that the taxable property of said precinct, as shown by the assessment made by the assessor of said precinct for the year 1883, amounted to the sum of $176,000; that said assessment for the year 1883 was made up in part of the lands in said precinct purchased under an act of Congress of April 10th, 1876, providing for the sale of the Pawnee Indian reservation, and
17 on which full payment of the purchase-money had not been made by the purchasers to the Government of the United States, and to which patents had not been issued by the United States, and that the aggregate amount of lands was about 18,000 acres, and the assessment of said lands deducted from the total assessed valuation of the precinct would reduce said assessment below the sum of $170,000; that part payment had been made to the Government on all of said lands so assessed by the purchasers thereof, and said lands were and are held by such purchasers under the terms of their said purchases under said act and none of the same has reverted to the Government, nor has the Government cancelled or declared forfeited any of said purchases; that the assessment of the property, real and personal, in said precinct for the year 1883 was duly returned, as provided by law, and said assessment was considered by the county commissioners of said county while sitting as a board of equalization, at the time and in the manner provided by law, for said year 1883, and as so equalized and approved by said board was placed upon the records of said county and was the assessment of said precinct upon which the taxes for State, county, and other purposes were levied for said year; that said assessment still stands without change upon the records of said county, and no legal proceedings have been commenced to in any manner change or alter said assessment.

It is further agreed that the complainants are the owners and holders of the real estate, of the value of $——, situate in said precinct, and that the lands so owned and held will be liable for the

payment of the said taxes for the purpose of paying the bonds and coupons aforesaid.

It is hereby further stipulated that this cause shall be set down for final hearing upon the pleadings and this agreed state-
18 ment of facts at such time as the court will hear the same. The assessor's original assessment for said precinct for the year 1883, or a duly certified copy thereof, may be used by either party on the hearing.

HENRY & CRITCHFIELD,
Solicitors for Complainants.
JOHN M. THURSTON,
Att'y for Deft's.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 202, H. Bartley Lamb *et al. vs.* James M. Kennedy *et al.* Stipulation. Filed May 22, 1884. Elmer S. Dundy, Jr., dep'ty clerk, for E. D. Frank, clerk.

Thereupon, afterwards, at the May term of said court, on the 22d day of May, 1884, the following proceedings were had, as appear of record on folio 387, Journal "I" of said court, to wit:

Decree.

BARTLEY LAMB *et al.*
vs.
JAMES M. KENNEDY, ROBERT BAXTER, and HUGO VOGLE, as County Commissioners of Nance County, Nebr. } No. 202, H.

And now, to wit, on this 22nd day of May, A. D. 1884, comes this cause on to be heard on the bill, answer, replication, stipulation of facts, and the evidence, and it appearing to the court that the allegations in complainants' bill are true, and that complainants are entitled to the relief therein prayed:

It is therefore ordered, adjudged, and decreed by the court that the temporary writ of injunction heretofore issued in said cause restraining the defendants, as commissioners of said county, from issuing bonds to the amount of seventeen thousand dollars on behalf of the precinct of Fullerton, county of Nance, and State of
19 Nebraska, be, and the same is hereby, made perpetual; and that said defendants, as county commissioners, and each of them, and their successors in office, be, and are hereby, perpetually restrained and enjoined, upon the pain of being adjudged in contempt of the deeree of this court, from issuing said bonds, levying or attempting to levy a tax upon the precinct of Fullerton or the taxable property therein for the purpose of enforcing the payment of said pretended liability growing out of the vote and proceeding in said bill mentioned.

It is further ordered, adjudged, and decreed by the court that said election in said bill mentioned is, and the same is hereby declared to be, null and void.

It is further ordered, adjudged, and decreed by the court that the defendants pay the entire cost of this proceeding, and that execution issue therefor. Defendants pray an appeal, which is allowed.

(Signed) ELMER S. DUNDY, *Judge.*

20 DISTRICT OF NEBRASKA, *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 20, contain true and faithful transcripts of the petition, answer, petition and bond for removal, replication, stipulation, and decree of record and on file in my office as said clerk, and the endorsements thereon, in the case of Bartley Lamb *et al. vs.* James M. Kennedy *et al.*

Witness my hand and the seal of said court, at Omaha, this 6th day of September, A. D. 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 307. James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of the county of Nance, appellants, *vs.* Bartley Lamb, Frank Hodges, J. H. Umstead, Nelson W. Main, *et al.* Filed September 20, 1884.

FILED
MAY 11 1887
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

JAMES M. KENNEDY, ROBERT BAXTER and HUGO VOGLE, as County Commissioners of the County of Nance,

Appellants,

vs.

BARTLEY LAMB, FRANK HODGES, J. H. UMSTEAD, NELSON W. MAIN et al.

No. 307.

BRIEF FOR APPELLANTS

BY

JOHN F. DILLON.

BURGOYNE'S "Quick" Print, Cor. Walker and Centre Sts., N. Y.

It is further ordered, adjudged, and decreed by the court that the defendants pay the entire cost of this proceeding, and that execution issue therefor. Defendants pray an appeal, which is allowed.

(Signed) ELMER S. DUNDY, *Judge.*

20 DISTRICT OF NEBRASKA, *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 20, contain true and faithful transcripts of the petition, answer, petition and bond for removal, replication, stipulation, and decree of record and on file in my office as said clerk, and the endorsements thereon, in the case of Bartley Lamb *et al. vs.* James M. Kennedy *et al.*

Witness my hand and the seal of said court, at Omaha, this 6th day of September, A. D. 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 307. James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of the county of Nance, appellants, *vs.* Bartley Lamb, Frank Hodges, J. H. Umstead, Nelson W. Main, *et al.* Filed September 20, 1884.

RECEIVED
FILED
MAY 11 1887
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

JAMES M. KENNEDY, ROBERT BAXTER and HUGO VOGLE, as County Commissioners of the County of Nance,

Appellants,

vs.

BARTLEY LAMB, FRANK HODGES, J. H. UMSTEAD, NELSON W. MAIN et al.

No. 307.

BRIEF FOR APPELLANTS

BY

JOHN F. DILLON.

BURGOYNE'S "Quick" Print, COR. WALKER AND CENTRE STS., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

JAMES M. KENNEDY, ROBERT BAXTER, and HUGO VOGEL, as County Commissioners of the County of Nance, Appellants, AGAINST BARTLEY LAMB, FRANK HODGES, J. H. UMSTEAD, NELSON W. MAIN, ET AL.	No. 307.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a decree entered in the Circuit Court for the District of Nebraska restraining the appellants, the County Commissioners of Nance County, from issuing bonds to the amount of $17,000 on behalf of the precinct of Fullerton, in said County; and also declaring the election authorizing the issue of said bonds null and void. The case was heard upon a petition, answer, replication and agreed statement of facts.

THE APPELLEES ALLEGE IN THE PETITION that they are taxpayers of the precinct of Fullerton, County of Nance,

and sue in their own behalf and in behalf of all the taxpayers of said precinct who claim the benefit of the petition. It is alleged in the petition that the appellants (defendants below), as County Commissioners, made an order submitting to the legal voters of the precinct a proposition to issue $17,000 of bonds in aid of the Omaha, Niobrara and Black Hills Railroad Company, which order is set out in full in the petition (Record, p. 1). In pursuance of said order, an election was held on 17th day of September, 1883, and resulted in 235 votes being cast in favor of the issue of said bonds and the levying of the necessary tax to meet the same, and 67 votes against said bonds and tax. It is further alleged that in pursuance of said election and vote the County Commissioners are intending to issue bonds amounting in the aggregate to $17,000. The petition alleges that while the property assessed in said precinct for the year 1883 was assessed at the sum of $176,000, yet that said assessment was in part illegal, for the reason that it included lands in said precinct the title to which is still in the Government of the United States and to which the persons to whom they were assessed were not entitled to a conveyance, and that said lands were assessed at the amount of $20,000. In consequence of such illegal assessment, it is alleged that the County Commissioners, under the laws of the State of Nebraska, possessed no jurisdiction or authority to order said election and to issue said bonds. An injunction is prayed for restraining the issue of said bonds on the ground that, if issued, said bonds will encumber the property of the petitioners, and that they are without adequate relief in the premises.

THE ANSWER denies want of authority in the County

Commissioners to order said election, and denies all allegations of irregularities in the mode of conducting the same, and alleges that the petition does not exhibit sufficient equities to entitle the complainants to the relief sought.

THE REPLICATION denies each and every allegation of the answer.

THE CASE WAS SUBMITTED upon an agreed statement of facts which will be found in the record, pages 9 and 10. The following are the facts as agreed upon in relation to the lands claimed to be illegally assessed and the facts in relation to the assessment thereof :

"It is further agreed that the taxable property of said precinct, as shown by the assessment made by the assessor of said precinct for the year 1883, amounted to the sum of $176,000 ; that said assessment for the year 1883 was made up in part of the lands in said precinct purchased under an Act of Congress of April 10th, 1876, providing for the sale of the Pawnee Indian Reservation, and on which full payment of the purchase money had not been made by the purchasers to the Government of the United States, and to which patents had not been issued by the United States, and that the aggregate amount of lands was about 18,000 acres, and the assessment of said lands deducted from the total assessed valuation of the precinct would reduce said assessment below the sum of $170,000 ; that part payment had been made to the Government on all of said lands so assessed by the purchasers thereof, and said lands were and are held by such purchasers under the terms of their said purchases under said act and none of the same has reverted to the Government, nor has the Government cancelled or declared forfeited any of said purchases ; that the assessment of the property, real and personal, in said precinct for the year 1883 was duly returned as provided by law, and said assessment was considered by the County Commissioners of said county while sitting as a board of equalization, at the time and in the manner provided by law, for said year 1883, and as so equalized and approved by

said board was placed upon the records of said county and was the assessment of said precinct upon which the taxes for State, county and other purposes were levied for said year; that said assessment still stands without change upon the records of said county, and no legal proceedings have been commenced to in any manner change or alter said assessment."

THE CIRCUIT COURT ENTERED A DECREE perpetually restraining the appellants, as Commissioners of said county, from issuing said bonds and from attempting to levy a tax to enforce the payment of any liability growing out of the vote and proceedings mentioned in the bill, and further decreed that the election authorizing the issue of said bonds to be null and void.

Assigment of Errors.

The Court below erred:

1. In declaring complainants entitled to the relief prayed for.

2. In restraining said defendants from issuing said $17,000 of bonds, and from levying a tax to enforce the payment thereof.

3. In declaring said election null and void.

Constitutional and Statutory Provisions Applicable to the case.

Article XII., Sec. 2, of the Constitution of Nebraska is as follows:

"SEC. 2. No city, county, town precinct, municipality, or other subdivision of the State, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at

an election by authority of law; Provided, That such donations of a county with the donations of such subdivisions in the aggregate *shall not exceed ten per cent. of the assessed valuation of such county;* Provided further, That any city or county may, by a two-thirds vote, increase such indebtedness five per cent. in addition to such ten per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the Secretary and Auditor of State, showing that the same is issued pursuant to law."

Chapter 45, Compiled Statutes of Nebraska (1885), *Sections 1, 2, 3, 4 and 7, are as follows:*

SECTION 1. That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement to an amount to be determined by the County Commissioners of such county or the City Council of such city, *not exceeding ten per centum of the assessed valuation of all taxable property in said county or city;* Provided, The County Commissioners or City Council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of a county the question of borrowing money.

SEC. 2. The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due; Provided, That an additional amount shall be levied and collected to pay the principal of said bonds when it shall become due; and, Provided further, That no tax shall be levied or collected to pay any of the principal of said bonds until after the year 1880.

SEC. 3. The proposition shall state the rate of interest such bond shall draw and when the principal and interest shall be made payable.

SEC. 4. If two-thirds of the votes cast at any such election for the purpose herein set forth be in favor of the propositions submitted, the County Commissioners, in the case of a county, and the City Council, in the case of a city, shall cause the proposition and result of

the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and shall thereupon issue said bonds, which shall be and continue a subsisting debt against such county or city until they are paid and discharged.

* SEC. 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the County Commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds.

ARGUMENT.

The County Commissioners had authority under the Constitution and laws of Nebraska to order the election authorizing the issue of the bonds in question, and such bonds were regularly voted.

As to the regularity of the manner of conducting the election, no point seems to have been made. It appears and is conceded by the statement of facts in the case to have been conducted in compliance with law. The objection was raised, however, that the County

---

*This section was repealed in 1885, but was in force at the time the bonds were voted.

Commissioners possessed no authority to order said election and that for this reason it was null and void.

In support of this objection the appellees undertook to *go behind* the assessment of the property in Fullerton precinct and to show that certain property was improperly included in said assessment, which if excluded would render issue of the $17,000 of bonds in violation of Article XII., Section 2 of the Constitution of Nebraska. This, it is submitted, cannot be done.

The only limitation prescribed by the provision referred to upon the power of the Legislature to authorize municipalities to issue bonds in aid of works of internal improvement is that such issue shall not exceed ten per cent. of the assessed valuation of the property in the municipality. The statutory provisions under which the bonds in dispute are attempted to be issued (quoted p.) have been held to be constitutional and in harmony with the constitution.

Reineman vs. Railroad Co., 7 Neb., 310.

By these provisions the County Commissioners are authorized to submit a proposition of the issuing of bonds to the legal voters of the county, city or precinct. If two-thirds of the votes cast are in favor of the proposition then the bonds shall be issued. If the amount of the bonds issued is less that ten per cent. of the assessed valuation of the property of the county, city or precinct, no objection can be raised as to lack of power to issue the same.

WE INSIST that the assessed valuation of the property in a municipality can, for the purposes here in question, be determined only by reference to the last official assessment prior to the election authorizing the issue

of the bonds. In the nature of the case this must be so, and it has been practically so decided both by this Court and by the Supreme Court of Nebraska.

Dixon County vs. Field, 111 U. S., 95.
Reineman vs. R. R. Co., 7 Neb., 310, 311.

In Dixon County vs. Field, 111 U. S., 83, this Court passed upon the constitutional provision in question. In that case the amount of the bonds issued was greater than ten per cent. of the assessed valuation as shown by the assessment. It was held that the county was not estopped by any of the recitals in the bond to deny that the assessed valuation was less than the required amount. This decision was placed on the ground that the assessment itself was a public record open to all persons, and which concludes all determinations that contradict it.

In delivering the opinion of the Court, Mr. Justice MATTHEWS says (p. 95.):

"In the present case there is no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power there were necessarily two factors, the amount of the bonds to be issued and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds as well as to the county officers.* This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment

of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determinations as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

The principle here laid down covers the case at the bar.

We confidently insist that it is conclusive of this case, without further inquiry.

In Buchanan vs. Litchfield, 102 U. S., 278, a somewhat similar provision, found in the Constitution of Illinois, was construed by this Court. The Constitution limited the indebtedness which the city was authorized to contract to

"Not exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness."

In referring to this limitation, Mr. Justice HARLAN says (p. 288):

"In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but

only in the mode prescribed in the Constitution—that is, by reference to the last assessment for State and county taxes for the year preceding the issuing of the bonds. That test was applied in this case. Had there been under or by competent legal authority an assessment for that year of taxable property within the city separately from all other property in the county or township to which the city belonged, such an assessment would undoubtedly have been controlling. But there was no such official assessment in fact or required by law. * * * The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873."

It is clear that the assessment of 1883 is the only means of determining the valuation of the property in the precinct of Fullerton at the time of the election, and it is submitted that the valuation thus fixed is conclusive and incapable of being collaterally impeached.

From the agreed statement of facts, the law is conceded to have been complied with in all respects as to the manner of making and returning the assessment of the property of Fullerton precinct for 1883, and it is also conceded that

"said assessment was considered by the County Commissioners of said county while sitting as a board of equalization, at the time and in the manner provided by law, for said year 1883, and as so equalized and approved by said board was placed upon the records of said county and was the assessment of said precinct upon which the taxes for State, county and other purposes were levied for said year; that said assessment still stands without change upon the records of the county, and no legal proceedings have been commenced to in any manner change or alter said assessment." (Record, p. 10).

Upon this state of facts it is clear, upon an examination of the Statutes of Nebraska on the subject of taxation and the powers of the Board of Equalization and in view of the decisions of the Supreme Court of Nebraska in construing such statutes, that the assessed valuation of the property in Fullerton precinct was conclusively fixed for all purposes, and certainly as against any claim of the appellees to impeach the same in this collateral proceeding.

Chapter 77 of the Compiled Laws of Nebraska prescribes the manner of assessing and taxing property. The county clerk of each county is required to provide books for each precinct. The assessors are required to make their assessments in such books. It thus appears that the assessed valuation of each precinct is arrived at separately and independently and is capable of being ascertained with exactness Upon the returns made by the assessors, the County Commissioners act as a board of equalization, possessing power to make assessment of lands not assessed, and upon the application of any person aggrieved, to review the assessment and correct the same as may be just. While sitting as a board of equalization, the County Commissioners exercise judicial functions, and the result of their determinations cannot be impeached collaterally, even when they have made assessments or deductions which are illegal.

The Supreme Court of Nebraska in Railroad Co. vs. Seward County, 10 Neb., 211, held in an injunction suit to restrain the collection of taxes levied upon the plaintiff's property, that the assessment, after having been acted upon by the County Commissioners, acting as the Board of Equalization, was conclusive. As this case very clearly states the power of the board of

equalization and the effect of their action upon the assessment in rendering it conclusive upon all persons against collateral attack, an extended quotation from the opinion will be given.

The Court says :

" There can be no doubt of the illegality of the several exemptions and deductions in the assessment of property here complained of, although the assessors doubtless performed their duties in good faith, as they understood them, and with no design to wrong the plaintiff or any other taxpayer. These errors were occasioned, doubtless, from the failure of the proper officers to observe the conflict between the act of February 12, 1869, to encourage the growth of timber and fruit trees, under which they were accustomed to proceed, and the provisions of Article 9 of our present Constitution. By the former the deductions were specially provided for, while under the latter—the paramount law—all that can be exempted by the Legislature from taxation on account of forest or fruit tree culture is the increased value to the land in consequence thereof.

" The effect, however, of the course pursued was to increase somewhat—nay, considerably—the rate of levy upon property placed on the tax duplicate for that year beyond what it would have been under a proper valuation. But this is always the result where, from any cause, such as the omission of taxable property from the assessment lists, or erroneous exemptions, property legally liable escapes taxation, which, indeed, is probably the case to a greater or less extent every year.

" Where a taxpayer feels himself wronged, either because his own property is valued too high, or that of others too low, or omitted altogether from the lists, a summary and inexpensive remedy is provided by a resort to the county board of equalization, a tribunal created expressly to hear complaints and make corrections of the assessment roll preliminary to the levy of of taxes, to the end that every person shall bear his due proportion, and no more, of the public burdens. The plaintiff, having entirely neglected to bring the matter of these deductions and exemptions to the attention of this board, is in no situation be heard in

complaint now. Nor does it matter that some of the deductions were made, as the evidence shows, by the board of equalization. This was error to be sure, but having occurred in the determination of a question of which the board had jurisdiction, their decision must stand until corrected in a proper proceeding. In this particular all tribunals exercising judicial functions are treated alike."

It follows from this construction of the revenue laws of Nebraska by the Supreme Court of the State, made in an action to restrain the *collection* of a tax on a *valuation* which, as stated by the Court, was *clearly illegal and in violation of the constitution*, that if the assessment was conclusive in such an action, the valuation of property so fixed must certainly be conclusive in an action like the present one. The assessment for Fullerton precinct for 1883 stands to-day unimpeached. Neither the petitioners nor any other tax payer sought to have any of the lands that they claim were illegally assessed dropped from the assessment roll. This assessment shows property the assessed valuation of which was $176,000; and upon this valuation the County Commissioners had authority to order the election to issue $17,000 of bonds.

The assessment is the limitation fixed by the Constitution upon the authority of the County Commissioners to order the election. So long as that limitation is not transcended, the authority is ample, and any action taken upon that basis is legal, and this is the view which was taken by this Court in Dixon County vs. Field, *supra*, where it is said (p. 95): "It is the amount as fixed by reference to that record (the assessment), that is made by Constitution the *standard for measuring the limit of municipal power.*"

Could the bondholder in the case referred to have introduced testimony to show that in that case there had been erroneous exemptions of property which, if assessed, would have increased the assessment to an amount sufficient to sustain his bonds? Certainly not. Neither in this case can the reverse be shown.

The assessed value of the property in Fullerton precinct, as shown by the assessment, being over $170,000, the issuing of $17,000 in bonds is clearly legal, for the regularity of the election, and its result in favor of the issuing of the bonds, is conceded.

If the assessment can be impeached collaterally, then we insist

II. Under the Laws of Nebraska, the interest of the purchasers in the lands claimed to be illegally assessed, was properly included in the assessment for 1883.

As indicated by chapter 77 of the Compiled Laws of Nebraska, the policy of the State is to cause all classes of property, both real and personal, to bear the burdens of taxation. To that end, sections 3 and 12 of that chapter were enacted.

They are as follows:

"Sec. 3. School lands sold under any provisions of any law of this State, or such as have been heretofore sold, shall not be taxable until the right to a deed shall have become absolute, except the value of the interest of such purchasers shall be taxable, which interest shall be determined by the amount paid and invested in improvements on such lands; provided, that the increased value of such improvements by reason of live fences, fruit and forest trees, grown and cultivated on such lands, shall not be taken into account in assessing the value of such improvements."

"Sec. 12. When real estate is exempt in the hands of the holder of the fee, and the same is contracted to

be sold, the amount paid thereon by the purchaser with the enhanced value of the investment and improvement thereon until the fee is conveyed, shall be held to be personal property, and listed and assessed as such, in the place where the land is situated."

Nothing appears in the record which is inconsistent with the idea that the land claimed to be illegally assessed was not assessed to its full value; but that only the interests of the purchasers thereof, together with the improvements made by them, was assessed. This would be authorized by section 12 above quoted. It appears from the agreed statement of facts (Record, p. 10) that said land was, at the time of the assessment, held by the purchasers under contracts for purchase; that part payment had been made thereon, and that none of said purchases had been declared forfeited by the Government. It appears from the petition (Record, p. 3) that said lands were assessed at $20,000. The aggregate amount of said lands was 18,000 acres (Record, p. 10). The assessed valuation was very low, being but a little over $1 per acre. There is nothing in the record which determines how these lands were taxed. It should be presumed, however, in the absence of any statement to the contrary, that the assessors acted in accordance with the tax laws of Nebraska and assessed only the interests of the purchasers. This presumption is supported by the low valuation shown by the record.

It is submitted that such interests of such purchasers could be legally assessed and taxed. These lands were held by persons who possessed property rights in them. In taxing the interests of the purchasers, no attempt was made to tax the interest of the United States. So long as the purchasers complied with the terms of

their purchase, the United States could not declare such purchases forfeited. The rights of the purchasers, like other property, could be sold by them; and, if so, what objection can be raised to the taxation of the interests of the purchasers in such lands and the sale of these rights and interests by the State for the non-payment of taxes. No sale would interfere with the rights of the United States, and would only affect the interests of the purchasers. The question of the taxation of school lands was presented in, and the means here taken are sustained by the Supreme Court of Nebraska in Haginbuck vs. Reed, 3 Neb., 17.

III. The appellees have no equity to the relief sought.

It is insisted by us that the appellees are not entitled to an injunction restraining the issue of the bonds, and that their petition is without sufficient equities to entitle them to such relief.

It appears from the proposition set forth in the petition (Record, p. 2) that "*bonds shall be issued to said Railroad Company when said road shall be graded, tied and ironed and completed ready for the running of trains and trains running thereon* from said Genoa to Fullerton [a distance of 13 miles], provided the same shall be completed to said Fullerton * * * on or before the first day of January, A. D. 1884."

It is alleged in the petition (Record, p. 3) "that *in pursuance of said pretended election and vote*, said County Commissioners are threatening and intending to issue said bonds and coupons."

The election was held on the 17th of November, 1883. The assessment under the Laws of Nebraska was com-

pleted by the Board of Equalization in July, 1883. (Compiled Laws, Chap. 77, Sec. 70). The petition was filed Nov. 7, 1883. No allegation is contained in the petition that the railroad was not completed as required by the proposition; but, on the contrary, it is expressly conceded that "*in pursuance of* said pretended election and vote," said County Commissioners were about to issue the bonds. This is a direct admission that said railroad was completed and in running order. It thus appears from the petition that the petitioners, having knowledge of the proposition and election, notice thereof having been published according to law, and with knowledge of the alleged illegal assessment, stood by and saw the railroad constructed on the faith of the election and vote, and never raised any objection to the issuing of the bonds or took measures to set aside the election until they were in the full enjoyment of the benefits of the increased railroad facilities furnished by the railroad. Then they come into a court of equity and ask relief, and to that end ask the Court to declare the assessment and taxation of certain property illegal, although they themselves have received the benefits of such assessment and levy of taxes, in that such assessment and levy necessarily relieved them from part of the taxes they would otherwise have been compelled to pay.

Under such circumstances, the petitioners certainly are not entitled to the equitable relief sought.

It has been repeatedly and uniformly held in suits to enjoin the collection of taxes that land owners who have stood silently by and seen the work on a public improvement going on, without objecting before acceptance by the municipality, cannot enjoin the collection

of the tax to pay for the same, on the ground that the proceeding was invalid.

Desty on Taxation, p. 666, and cases cited.

The same principle is involved in and should be applied to this case.

JOHN F. DILLON,
For Appellants.

May 9, '87.—50.

SUPREME COURT OF THE UNITED STATES.

JAMES M. KENNEDY, ROBERT BAXTER, and HUGO VOGLE, as County Commissioners of the County of Nance, Appellants,
vs.
BARTLEY LAMB, FRANK HODGES, J. M. UMSTEAD, NELSON W. MAIN, *et als.*
} In Equity.

STATE OF NEBRASKA, *County of Douglas,* } *ss:*

J. M. Thurston and A. J. Poppleton, being first duly sworn, depose and say that they have for several years past been the attorneys of the Omaha, Niobrara and Black Hills Railroad Company, the corporation to which the bonds referred to in this action were voted; that at the time said action was brought to restrain the issue of said bonds against the County Commissioners of said County of Nance, in consideration of the fact that said railroad company were the real parties in interest, and the said Board of County Commissioners were willing that the said bonds should be issued in accordance with the proposition as adopted at the election held to determine whether the same should be issued or not, and in further consideration that the said railroad company should pay all costs and expenses of such litigation, affiants were authorized and empowered by said Board of County Commissioners to represent said board and said county in resisting said injunction; that under said arrangement they resisted said injunction in the courts of the State and in the circuit court of the United States, and with the knowledge, consent, and approval of said Board of County Commissioners took an appeal from the decree of said circuit court to the Supreme Court of the United States; that their authority to so represent said board and to prosecute said appeal to final hearing and decree has never to their knowledge been revoked; that no notice has been served upon them, either orally or in writing, of any action of the Board of County Commissioners or of any other county authorities revoking or curtailing or in any manner affecting their power to represent said county and said Board of Commissioners and prosecute said appeal. Affiants are unable now to state, without examination of the records of said county, whether such authority was ever granted in writing and made of record upon the records of said county, but that the same was orally given, was exercised with the full knowledge of all the county officers and authorities, and that affiants have never been notified of any revocation or modification of such authority, and that the same has not been revoked or modified to their knowledge.

Affiants further say that Judge John F. Dillon appeared in said

cause in the Supreme Court of the United States for the appellants at the request of affiants.

A. J. POPPLETON.
J. M. THURSTON.

Sworn to before me and signed in my presence this thirteenth day of May, A. D. 1887.

[NOTARIAL SEAL.] J. S. SHROPSHIRE,
Notary Public.

[Endorsed:] In Supreme C't U. S. 1887, Octo. term. No. 37. James M. Kennedy *et al.* Co. Comm'rs of Nance Co. *vs.* Bartley Lamb *et al.* Appeal from C. C. U. S. for district of Nebraska. Affidavit of J. M. Thurston and A. J. Poppleton, attorneys for appellants.

[Stamped:] Office Supreme Court U. S. Filed Oct. 21, 1887. James H. McKenney, clerk.

FULLERTON, NANCE COUNTY, NEBRASKA,
January 14*th*, 1886.

Board met pursuant to adjournment.

Present: Dan. Barker, chairman, and other members—Gay, Oleson, Leuker, McClure, Pierce, Stewart, and Kinney. Absent: Horton, Jackson, and Millard.

H. G. Stewart, supervisor for Cedar township, offered the following resolution:

Be it resolved by the board of supervisors of Nance county, Nebraska, That whereas, in the cause of Bartley Lamb, Frank Hodges, J. H. Murstead, Nelson W. Main, A. F. Tredway, Silas Main, W. J. Johnston, M. H. Huff, J. W. Zink, Michael Ryan, and W. F. Hinman *versus* James M. Kennedy, Robert Baxter, and Hugo Vogle, as county commissioners of Nance county, Nebraska, an appeal has been taken on behalf of said Nance county from the decree rendered on the 22d day of May, A. D. 1884, in said cause by the circuit court of the United States in and for the district of Nebraska, to the Supreme Court of the United States of America; and whereas said appeal was taken on behalf of said county by solicitors unauthorized by said county to take the same; and whereas said county is willing to abide by the decree rendered in said cause by said circuit court of the United States: Therefore—

Be it resolved, That said appeal, now pending in said Supreme Court of the United States, be dismissed, and that J. C. Cowin, of Omaha, Nebraska, be authorized by said Nance county, acting through its board of supervisors, to take all necessary steps on behalf of said county to discontinue and dismiss said appeal, and that he be the only attorney authorized to further appear on behalf of said county in said cause.

On motion of Frank Gay, seconded by S. H. McClure, said resolution was declared adopted, the motion of Gay having prevailed.

On motion board adjourned to 9 o'clock a. m., Jan'y 15th, 1866.

DAN. BARKER, *Chairman.*

Attest:

[COUNTY SEAL.] J. M. SHUMAKER,
County Clerk.

STATE OF NEBRASKA, } *ss:*
Nance County, }

I, A. M. Shumaker, county clerk of Nance county, Nebraska, do hereby certify that the foregoing is a full, complete, correct, and perfect transcript of the minutes and proceedings of a session of the board of supervisors of said Nance county, continued and held pursuant to adjournment at Fullerton, the county seat of said Nance county, on the 14th day of January, A. D. 1886, being the regular January meeting of said board for said year, as the same appears of record in my office.